

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Section 1003 of the Television)	MB Docket No. 20-31
Viewer Protection Act of 2019)	

REPORT AND ORDER

Adopted: May 12, 2020

Released: May 13, 2020

By the Commission:

I. INTRODUCTION

1. In this *Report and Order (Order)*, we revise section 76.65 of our rules, which governs good faith negotiation of retransmission consent, to implement provisions in section 1003 of the Television Viewer Protection Act of 2019 (TVPA).¹ Under section 1003, the Commission must adopt rules that provide for negotiation of retransmission consent between “qualified multichannel video programming distributor [MVPD] buying group[s]” and “large [broadcast] station group[s]” as those terms are defined in the TVPA.² As discussed below, we adopt our proposals from the *NPRM* in this proceeding: (i) to define the term “large station group” as used in section 1003 to mean, in relevant part, an entity whose individual television broadcast station members *collectively* have a national audience reach of more than 20 percent;³ (ii) to define the term “qualified MVPD buying group” as used in section 1003 to mean, in relevant part, an entity that negotiates on behalf of MVPDs that collectively serve no more than 25 percent of all households receiving service from *any* MVPD in a given local market;⁴ and (iii) to codify in section 76.65 of our rules the provisions governing negotiation of retransmission consent

¹ The Television Viewer Protection Act of 2019, Pub. L. No. 116-94, 133 Stat. 2534, 3198 (2019) (amendments codified at 47 U.S.C. § 325). This *Order* adopts rules that implement only section 1003 of the TVPA (“Satisfaction of Good Faith Negotiation Requirement by Multichannel Video Programming Distributors [MVPDs]”). See *Implementation of Section 1003 of the Television Viewer Protection Act of 2019*, MB Docket No. 20-31, Notice of Proposed Rulemaking, 35 FCC Rcd 644, para. 1, n.6 (2020) (*NPRM*). The Media Bureau has addressed implementation of section 1004 of the TVPA, which establishes truth-in-billing requirements applicable to MVPDs and providers of fixed broadband Internet access service, in a separate proceeding. See *Implementation of Section 1004 of the Television Viewer Protection Act of 2019*, MB Docket No. 20-61, Order, DA 20-375 (MB Apr. 3, 2020) (granting a blanket extension until December 20, 2020, of the effective date of truth-in-billing requirements set forth in section 642 of the Act, as added by section 1004 of the TVPA). Through this rulemaking, we fulfill our statutory obligation to revise our rules to specify that “certain small MVPDs can meet the obligation to negotiate [retransmission consent] in good faith . . . by negotiating with a large station group through a qualified MVPD buying group.” See 47 U.S.C. § 325(b)(3)(C)(vi) (as added by Section 1003(a)(3) of the TVPA); H.R. Rep. No. 116-329, 116th Cong., 1st Sess. 2019 at 8 (setting forth the relevant legislative history for the TVPA) (*House Report*).

² 47 U.S.C. § 325(b)(3)(C)(vi) (as added by section 1003(a)(3) of the TVPA).

³ *NPRM* at paras. 6-7. Aside from satisfying the audience reach requirement, a “large station group” otherwise must meet the definition set forth in section 325(b)(7)(D) of the Act. See 47 U.S.C. § 325(b)(7)(D) (as added by section 1003(b)(3) of the TVPA).

⁴ *NPRM* at paras. 6, 8. Aside from satisfying this requirement, a “qualified MVPD buying group” otherwise must meet the definition set forth in section 325(b)(7)(C) of the Act. See 47 U.S.C. § 325(b)(7)(C) (as added by section 1003(b)(3) of the TVPA).

between qualified MVPD buying groups and large station groups,⁵ as well as the definitions of “local market” and “multichannel video programming distributor” set forth in section 1003(b)(3).⁶ As proposed, we also make minor conforming changes to section 76.65.⁷

II. BACKGROUND

2. In December 2019, Congress enacted the TVPA, which is the latest in a series of statutes that have revised the Communications Act of 1934 (Act) to establish parameters for the carriage of television broadcast stations by MVPDs.⁸ Section 1003 of the TVPA revised section 325(b) of the Act principally by allowing smaller MVPDs to negotiate collectively as a buying group for retransmission consent with large broadcast station groups.⁹ Specifically, section 1003(a)(3) revised section 325(b)(3)(C) by adding new subsection 325(b)(3)(C)(vi), which directs the Commission to commence a rulemaking proceeding to revise its retransmission consent rules to specify that:

(I) a [MVPD] may satisfy its obligation to negotiate [retransmission consent] in good faith under [section 325(b)(3)(C)(iii)] . . . with a large [broadcast] station group by designating a qualified MVPD buying group to negotiate on its behalf, so long as the qualified MVPD buying group itself negotiates in good faith in accordance with such clause;

(II) it is a violation of the obligation to negotiate in good faith under [section 325(b)(3)(C)(iii)] for the qualified MVPD buying group to disclose the prices, terms, or conditions of an ongoing negotiation or the final terms of a negotiation to a member of [such] . . . group that is not intending, or is unlikely, to enter into the final terms negotiated by the . . . group; and

(III) a large [broadcast] station group has an obligation to negotiate [retransmission consent] in good faith under [section 325(b)(3)(C)(ii)] with respect to a negotiation . . . with a qualified MVPD buying group.¹⁰

3. In addition, section 1003(b) of the TVPA amended section 325(b)(7) of the Act principally by adding new subsections 325(b)(7)(C) and (D), which define the terms “qualified MVPD buying group” and “large station group,” respectively, for the purpose of applying the new good faith negotiation provisions of section 325(b)(3)(C)(vi).¹¹ New section 325(b)(7)(C) of the Act defines “qualified MVPD buying group,” in relevant part, as an entity that:

(i) negotiates [retransmission consent] on behalf of two or more multichannel video programming distributors—

(I) none of which is a [MVPD] that serves more than 500,000 subscribers nationally; and

(II) that do not collectively serve more than 25 percent of all households served by a [MVPD] in any single local market in which the applicable large station group operates.¹²

⁵ *NPRM* at para. 9 (proposing to codify, with minor, non-substantive changes, the provisions set forth in 47 U.S.C. § 325(b)(3)(C)(vi)(I)-(III), as added by section 1003(a)(3) of the TVPA).

⁶ *NPRM* at para. 9; 47 U.S.C. § 325(b)(7)(E), (F) (as added by section 1003(b)(3) of the TVPA).

⁷ *NPRM* at para. 9 (proposing to delete the phrase “as defined in 17 U.S.C. 122(j)” in section 76.65(viii) and (ix) of the Commission’s rules).

⁸ *Id.* at para. 2, n.7.

⁹ *See* 47 U.S.C. § 325(b)(3)(C)(vi) (as added by section 1003(a)(3) of the TVPA).

¹⁰ *Id.*

¹¹ *Id.* § 325(b)(7)(C), (D) (as added by section 1003(b) of the TVPA). Section 1003(b) also amended section 325(b)(7) of the Act by adding subsections (b)(7)(E) and (F), which define the terms “local market” and “multichannel video programming distributor,” respectively.

¹² *Id.* § 325(b)(7)(C) (as added by section 1003(b) of the TVPA).

4. Moreover, new section 325(b)(7)(D) of the Act defines “large station group” as a group of television broadcast stations that:

- (i) are directly or indirectly under common de jure control permitted by the regulations of the Commission;
- (ii) generally negotiate agreements for retransmission consent . . . as a single entity; and
- (iii) include only television broadcast stations that have a national audience reach of more than 20 percent.¹³

5. In January 2020, the Commission issued the *NPRM*, which proposed to revise section 76.65 of its rules as set forth above.¹⁴ The pleading cycle for the *NPRM* ended on March 16, 2020.¹⁵ Three parties filed comments in response to the *NPRM*,¹⁶ and no parties filed reply comments. Commenters uniformly support our proposals.¹⁷

III. DISCUSSION

6. We adopt the unopposed revisions to section 76.65 of our rules proposed in the *NPRM*. First, we revise section 76.65 to define the term “large station group” as, among other things, an entity whose individual television station members collectively have a national audience reach of more than 20 percent.¹⁸ We conclude that this interpretation of the term “large station group” finds support in the text and structure of the TVPA, and would best effectuate Congressional intent.¹⁹ In particular, as we noted in the *NPRM*, the text of the first two clauses in the definition of “large station group” require, respectively, that stations comprising a “large station group” be under “common de jure control” and negotiate agreements as a “single entity.”²⁰ We find that these two requirements properly characterize only stations that collectively comprise a group, rather than individual stations, and that the third clause of the definition thus should be interpreted as imposing a requirement that must be true of the stations collectively.²¹ Moreover, as we observed in the *NPRM*, the TVPA contemplates that “qualified MVPD

¹³ *Id.* § 325(b)(7)(D) (as added by section 1003(b) of the TVPA).

¹⁴ *Supra* para. 1 (listing rule revisions proposed in the *NPRM*). See also *NPRM* at para. 1.

¹⁵ See *Comment and Reply Comment Dates Set for NPRM Implementing Section 1003 of the Television Viewer Protection Act of 2019*, MB Docket No. 20-31, Public Notice, DA 20-169 (MB Feb. 19, 2020).

¹⁶ These parties are: ACA Connects – America’s Communications Association (ACA Connects); the National Association of Broadcasters (NAB); and NTCA – the Rural Broadband Association (NTCA).

¹⁷ See, e.g., NAB Comments at 1 (asserting that “these proposals comport with Congress’s intent in enacting the TVPA”).

¹⁸ *NPRM* at para. 6.

¹⁹ *Id.* at para. 7. As we noted in the *NPRM*, this interpretation also is harmonious with the Commission’s ownership restrictions. *Id.*, citing 47 CFR § 73.3555(e)(1) (providing that “[n]o license for a commercial television broadcast station shall be granted, transferred or assigned to any party . . . if the grant, transfer or assignment of such license would result in such party . . . having a cognizable interest in television stations which have an *aggregate national audience reach* exceeding [39 percent]”) (emphasis added); Pub. L. 10-199, § 629(1) (directing the Commission to revise its multiple ownership rules set forth in section 73.3555 of its rules by increasing the national audience reach limitation for television stations to 39 percent).

²⁰ *Id.*, citing 47 U.S.C. § 325(b)(7)(D)(i)-(ii) (as added by section 1003(b) of the TVPA).

²¹ *Id.*, citing *United States v. Finn*, 502 F.2d 938, 942 (7th Cir. 1974) (stating that under normal canons of statutory construction, “parallel and sequentially numbered clauses” should be interpreted so that they “all bear the same relationship to the rest of the sentence”). See also NAB Comments at 1 (stating its agreement with the *NPRM*’s proposal to define the term “large station group” to mean “an entity whose individual television station members collectively have a national audience reach of more than 20 percent”).

buying groups” and “large station groups” would be counterparties in a retransmission consent negotiation.²² Because the former term imposes a market share cap of 25 percent on the MVPDs “collectively,”²³ we conclude that the 20 percent market share threshold for “large station groups” similarly should be construed to apply to the stations collectively.²⁴ Finally, given that a key purpose of the new good faith negotiation provisions is to level the playing field by “allow[ing] smaller MVPDs to collectively negotiate as a buying group [with large station groups] for retransmission consent,”²⁵ we adopt our tentative finding that Congress could not have intended to create a collective negotiation mechanism to address the growing bargaining power of large station groups but then defined those groups in a way that would render the mechanism unavailable as a practical matter.²⁶ As we stated in the *NPRM*, a contrary interpretation, whereby each station in the group individually must have at least a 20 percent national audience reach, would be illogical given that there are currently no stations that meet this threshold.²⁷

7. We also adopt our proposal to construe the phrase “all households served by a [MVPD]” in the statutory definition of “qualified MVPD buying group”²⁸ to mean all households that receive service from *any* MVPD, rather than all households served by a *specific* MVPD in a given local market.²⁹ Because the percentage of households that subscribe to a particular MVPD (or class of MVPDs) relative to the total number of households that subscribe to any MVPD in a given market is a competition metric that the Commission historically has utilized,³⁰ we conclude that this is the most reasonable reading of the relevant phrase.³¹ We also believe, as noted in the *NPRM*, that adopting the alternative interpretation would create practical problems given that the statute provides no guidance as to which MVPD in a given market should serve as the benchmark for the relevant threshold.³²

8. Finally, we adopt our proposals: (i) to codify in section 76.65 the provisions governing negotiation of retransmission consent between qualified MVPD buying groups and large station groups

²² *Id.*, citing 47 U.S.C. § 325(b)(3)(C)(vi) (as added by section 1003(a)(3) of the TVPA).

²³ See 47 U.S.C. § 325(b)(7)(C)(i)(II) (as added by section 1003(b) of the TVPA).

²⁴ We do not find that the presence of the term “collectively” in the statutory definition of “qualified MVPD buying group,” as contrasted with the absence of that term in the definition of “large station group,” compels a different reading of the statute. In particular, we agree with ACA Connects’s assertion that the structure of the respective definitions required that Congress insert the word “collectively” in the former definition, but not in the latter. See ACA Connects Comments at 7-9 (asserting, among other things, that the definition of “qualified MVPD buying group” imposes two requirements, the first of which applies to each *individual* MVPD, and the second of which applies to MVPDs that *together* comprise a buying group, and that Congress thus needed “to insert the word ‘collectively’ in [that definition] ‘to signal the shift from an individual requirement to a collective requirement. By contrast . . . [the term] ‘large station group’ is defined in terms of three requirements . . . each of which . . . applies to the group as a whole. In that definition, the word ‘collective’ is implied from the structure.”).

²⁵ See H.R. Rep. No. 116-329, at 4.

²⁶ *NPRM* at para. 7.

²⁷ *Id.*, n.21 (citing Nielsen Media Research and explaining that “no individual broadcast station even meets the 20 percent national audience reach threshold” and noting that “the largest Designated Market Area (DMA) is New York, which covers roughly six percent of U.S. television households”).

²⁸ 47 U.S.C. § 325(b)(7)(C)(i)(II) (as added by section 1003(b) of the TVPA).

²⁹ *NPRM* at para. 8.

³⁰ *Id.*, citing *Communications Marketplace Report*, Report, 33 FCC Rcd 12558, 12599, fig. B-2 (2018); *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19861, 19876, para. 35 (2001).

³¹ *NPRM* at para. 8.

³² *Id.*

set forth in section 325(b)(3)(C)(vi)(I)-(III) of the Act, as added by section 1003(a)(3) of the TVPA³³ and the definitions of “local market” and “multichannel video programming distributor” set forth in section 325(b)(7)(E) and (F) of the Act, as added by section 1003(b)(3) of the TVPA;³⁴ and (ii) to delete the phrase “as defined in 17 U.S.C. 122(j)” in section 76.65(viii) and (ix).³⁵ Commenters uniformly support these revisions to section 76.65,³⁶ and no party has opposed them.³⁷

IV. PROCEDURAL MATTERS

9. *Final Regulatory Flexibility Act Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA),³⁸ the Commission has prepared a Final Regulatory Flexibility Act Analysis (FRFA) relating to this *Order*. The FRFA is set forth in Appendix B.

10. *Paperwork Reduction Act.* This document does not contain proposed new or revised information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. §§ 3501-3520). In addition, therefore, it does not contain any new or modified “information burden for small business concerns with fewer than 25 employees” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

11. *Congressional Review Act.* The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs that this rule is “non-major” under the Congressional Review Act, 5 U.S.C. § 804(2). The Commission will send a copy of this *Order* to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A).

12. *Additional Information.* For additional information on this proceeding, contact Raelynn Remy of the Media Bureau, Policy Division, at Raelynn.Remy@fcc.gov or (202) 418-2936.

V. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in sections 4(i), 4(j), 303(r), and 325 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 325, and section 1003 of the Television Viewer Protection Act of 2019,³⁹ this *Report and Order* **IS ADOPTED**, effective thirty (30) days after the date of publication in the Federal Register.

14. **IT IS ORDERED** that, pursuant to the authority found in sections 4(i), 4(j), 303(r), and 325 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 325, and

³³ *Id.* at para. 9.

³⁴ *Id.*

³⁵ *Id.* This change will conform our rules to section 1003(c)(2) of the TVPA, which strikes this phrase from Section 325(b)(3)(C) of the Act. *See* Pub. L. No. 116-94, § 1003(c)(2).

³⁶ *See, e.g.,* NAB Comments at 2 (agreeing that “the proposed rule changes are appropriate to effectuate the TVPA”).

³⁷ Although NTCA – the Rural Broadband Association “supports the Commission’s proposal as an initial first step toward fixing the broken retransmission consent process,” NTCA Comments at 2, it asserts that the Commission must go further to address anticompetitive behavior by content providers, including forced tying, tiering, and other unfair bargaining tactics. *Id.* at 4. Those issues, however, were not discussed in the *NPRM* and are therefore beyond the scope of this proceeding.

³⁸ *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

³⁹ Pub. L. No. 116-94, § 1003, 133 Stat. 2534, 3198 (2019).

section 1003 of the Television Viewer Protection Act of 2019,⁴⁰ the Commission's rules **ARE HEREBY AMENDED** as set forth in Appendix A.

15. **IT IS FURTHER ORDERED** that, should no petitions for reconsideration or petitions for judicial review be timely filed, MB Docket No. 20-31 shall be **TERMINATED**, and its docket **CLOSED**.

16. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this *Report and Order*, including the Final Regulatory Flexibility Act Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

17. **IT IS FURTHER ORDERED** that, pursuant to section 801(a)(1)(A) of the Congressional Review Act, 5 U.S.C. § 801(a)(1)(A), the Commission **SHALL SEND** a copy of the *Report and Order* to Congress and the Government Accountability Office.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁴⁰ *Id.*

APPENDIX A

Final Rules

The Federal Communications Commission revises 47 CFR Part 76 as follows:
PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Revise § 76.65 to read as follows:

§ 76.65 Good faith and exclusive retransmission consent complaints.

* * * * *

(b) * * *

(1) * * *

(viii) Coordination of negotiations or negotiation on a joint basis by two or more television broadcast stations in the same local market (**as defined in 17 U.S.C. 122(j)**) to grant retransmission consent to a multichannel video programming distributor, unless such stations are directly or indirectly under common de jure control permitted under the regulations of the Commission.

(ix) The imposition by a television broadcast station of limitations on the ability of a multichannel video programming distributor to carry into the local market (**as defined in 17 U.S.C. 122(j)**) of such station a television signal that has been deemed significantly viewed, within the meaning of § 76.54 of this part, or any successor regulation, or any other television broadcast signal such distributor is authorized to carry under 47 U.S.C. 338, 339, 340 or 534, unless such stations are directly or indirectly under common de jure control permitted by the Commission.

(2) Negotiation of retransmission consent between qualified multichannel video programming distributor buying groups and large station groups.

(i) A multichannel video programming distributor may satisfy its obligation to negotiate in good faith for retransmission consent with a large station group by designating a qualified MVPD buying group to negotiate on its behalf, so long as the qualified MVPD buying group itself negotiates in good faith in accordance with this section.

(ii) It is a violation of the obligation to negotiate in good faith for a qualified MVPD buying group to disclose the prices, terms, or conditions of an ongoing negotiation or the final terms of a negotiation to a member of the qualified MVPD buying group that is not intending, or is unlikely, to enter into the final terms negotiated by the qualified MVPD buying group.

(iii) A large station group has an obligation to negotiate in good faith for retransmission consent with a qualified MVPD buying group.

(A) “Qualified MVPD buying group” means an entity that, with respect to a negotiation with a large station group for retransmission consent—

(I) negotiates on behalf of two or more multichannel video programming distributors—

(i) none of which is a multichannel video programming distributor that serves more than 500,000 subscribers nationally; and

(ii) that do not collectively serve more than 25 percent of all households served by multichannel video programming distributors in any single local market in which the applicable large station group operates; and

(2) negotiates agreements for such retransmission consent—

(i) that contain standardized contract provisions, including billing structures and technical quality standards, for each multichannel video programming distributor on behalf of which the entity negotiates; and

(ii) under which the entity assumes liability to remit to the applicable large station group all fees received from the multichannel video programming distributors on behalf of which the entity negotiates.

(B) “Large station group” means a group of television broadcast stations that –

(1) are directly or indirectly under common de jure control permitted by the regulations of the Commission;

(2) generally negotiate agreements for retransmission consent under this section as a single entity; and

(3) include only television broadcast stations that collectively have a national audience reach of more than 20 percent;

(3) For purposes of this section and section 76.64 of this subpart, the following definitions apply:

(i) “Local market” has the meaning given such term in 17 U.S.C. 122(j); and

(ii) “Multichannel video programming distributor” has the meaning given such term in 47 U.S.C. 522.

(2)(4) Totality of the circumstances. * * * *

APPENDIX B

Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ the Commission has prepared this Final Regulatory Flexibility Analysis (FRFA) concerning the possible significant economic impact on small entities by the rules adopted in the attached *Order*. The Commission will send a copy of the *Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the *Order* and FRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rules

2. In this *Order*, pursuant to section 325(b)(3)(C) of the Act, as amended by section 1003 of the Television Viewer Protection Act of 2019 (TVPA),⁴ we revise our retransmission consent rules to specify, among other things, that certain small multichannel video programming distributors (MVPDs) may satisfy their obligation to negotiate retransmission consent in good faith by negotiating with a large broadcast station group through a qualified MVPD buying group. In particular, we revise section 76.65 of our rules to define: (i) the term “large station group” as used in section 1003 of the TVPA to mean, in relevant part, an entity whose individual television station members *collectively* have a national audience reach of more than 20 percent; and (ii) the term “qualified MVPD buying group” as used in section 1003 to mean, in relevant part, an entity that negotiates on behalf of MVPDs that collectively serve no more than 25 percent of all households receiving service from *any* MVPD in a given local market. In addition, we codify in section 76.65 the provisions governing negotiation of retransmission consent between qualified MVPD buying groups and large station groups, as well as the definitions of “local market” and “multichannel video programming distributor” set forth in section 1003(b)(3).⁵ We also make minor conforming changes to section 76.65.⁶

B. Legal Basis

3. The action in this *Order* is authorized pursuant to sections 4(i), 4(j), 303(r), and 325 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 325, and section 1003 of the Television Viewer Protection Act of 2019.⁷

C. Summary of Significant Issues Raised in Response to the IRFA

4. Without mentioning the IRFA, a couple of parties commented on the impact of the rules adopted in this *Order* on small entities. For example, NTCA asserts that a major challenge faced by smaller MVPDs in negotiating retransmission consent is the unequal bargaining power they possess due to their size relative to the bargaining power of programmers. NTCA argues that large MVPDs are able to obtain more favorable retransmission consent rates because they provide broadcasters with a larger

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (CWAAA).

² See 5 U.S.C. § 603(a).

³ See *id.*

⁴ Pub. L. No. 116-94, § 1003, 133 Stat. 2534, 3198 (2019).

⁵ See Appendix A.

⁶ For example, consistent with the statute, we delete the phrase “as defined in 17 U.S.C. 122(j)” in section 76.65(viii) and (ix) of our rules. Section 1003(c)(2) of the TVPA directs the Commission to strike this phrase from section 325(b)(3)(C) of the Act. See Pub. L. No. 116-94, § 1003(c)(2).

⁷ Pub. L. No. 116-94, § 1003, 133 Stat. 2534, 3198 (2019).

number of potential viewers that, in turn, generates additional advertising revenue. By contrast, NTCA contends, broadcasters are able to extract higher per-subscriber rates from smaller MVPDs because the broadcaster stands to lose little by denying the smaller MVPD access to programming. According to NTCA, smaller MVPDs often do not have the option of discontinuing video programming because a substantial portion of their customers cannot receive an over-the-air broadcast signal, and thus rely on their MVPD to carry broadcast stations that serve as a principal source for local news and weather reports. NTCA argues that allowing smaller MVPDs to negotiate retransmission consent agreements through a larger buying group will enable them to obtain access to programming at more reasonable rates. ACA Connects argues that swift adoption of the proposed rules will enable smaller MVPDs to utilize the TVPA's new protections promptly.

D. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

5. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.⁸ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁹ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.¹⁰ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.¹¹ Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

6. *Cable Companies and Systems (Rate Regulation Standard)*. The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.¹² In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.¹³ Industry data indicate that there are currently 4,392 active cable systems in the United States.¹⁴ Of this total, 3,691 cable systems have fewer than 15,000 subscribers, and 701 systems have 15,000 or more.¹⁵ Thus, we estimate that most cable systems are small entities.

7. *Cable System Operators (Telecommunications Act Standard)*. The Act also contains a size standard for a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not

⁸ 5 U.S.C. § 603(b)(3).

⁹ *Id.* § 601(6).

¹⁰ *Id.* § 601(3) (incorporating by reference the definition of "small-business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

¹¹ 15 U.S.C. § 632.

¹² 47 CFR § 76.901(d). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266 *et al.*, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408, para. 28 (1995).

¹³ 47 CFR § 76.901(c).

¹⁴ S&P Market Intelligence -MediaCensus data, 2nd Quarter, 2019.

¹⁵ *Id.*

affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”¹⁶ There are approximately 49,011,210 cable video subscribers in the United States today.¹⁷ Accordingly, an operator serving fewer than 490,112 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.¹⁸ Based on available data, we find that all but five incumbent cable operators are small entities under this size standard.¹⁹ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

8. Most recent available data also indicate that there are 188 cable antenna relay service (CARS) licensees.²⁰ The Commission, however, neither requests nor collects information on whether CARS licensees are affiliated with entities whose gross annual revenues exceed \$250 million. Although some CARS licensees may be affiliated with entities whose gross annual revenues exceed \$250 million, we are unable at this time to estimate with greater precision the number of CARS licensees that would qualify as small cable operators under the definition in the Communications Act.

9. *Open Video Services.* Open Video Service (OVS) systems provide subscription services.²¹ The open video system framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers.²² The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,²³ OVS falls within the SBA small business size standard covering cable services, which is “Wired Telecommunications Carriers.”²⁴ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.²⁵ To gauge small business prevalence for the OVS service, the Commission relies on data currently available from the U.S. Census for the year 2012. According to that source, there were 3,117 firms that in 2012 were Wired Telecommunications Carriers. Of these, 3,059 operated with fewer than 1,000 employees. Based on this data, the majority of these firms can be considered small.²⁶ In addition, we note that the Commission has certified some OVS operators, with some now providing

¹⁶ 47 U.S.C. § 543(m)(2); *see also* 47 CFR § 76.901(e).

¹⁷ *See* SNL Kagan, *Multichannel Industry Benchmarks*, <https://platform.mi.spglobal.com/web/client?auth=inherit#industry/multichannelIndustryBenchmarks> (last visited Jan. 14, 2020).

¹⁸ *See* 47 CFR § 76.901(e).

¹⁹ *See* SNL Kagan, *Top Cable MSOs*, <https://platform.mi.spglobal.com/web/client?auth=inherit#industry/topCableMSOs> (last visited Jan. 14, 2020).

²⁰ August 24, 2017, report from Media Bureau staff based on data contained in COALS, www.fcc.gov/coals.

²¹ *See* 47 U.S.C. § 573.

²² 47 U.S.C. § 571(a)(3)-(4). *See 13th Annual Report*, 24 FCC Rcd at 606, para. 135.

²³ *See* 47 U.S.C. § 573.

²⁴ U.S. Census Bureau, 2012 NAICS Definitions, 517110 Wired Telecommunications Carriers, <http://www.census.gov/naics/2012/def/ND517110.HTM#N517110>.

²⁵ 13 CFR § 201.121, NAICS code 517110 (2012).

²⁶ *See* U.S. Census Bureau, Table EC1251SSSZ5, <https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t#none>.

service.²⁷ Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises.²⁸ The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, at least some of the OVS operators may qualify as small entities. The Commission further notes that it has certified approximately 45 OVS operators to serve 116 areas, and some of these are currently providing service.²⁹ Affiliates of Residential Communications Network, Inc. (RCN) received approval to operate OVS systems in New York City, Boston, Washington, D.C., and other areas. RCN has sufficient revenues to assure that they do not qualify as a small business entity. Little financial information is available for the other entities that are authorized to provide OVS and are not yet operational. Given that some entities authorized to provide OVS service have not yet begun to generate revenues, the Commission concludes that up to 44 OVS operators (those remaining) might qualify as small businesses that may be affected by the rules and policies adopted herein.

10. *Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs).* SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA’s broad economic census category, “Wired Telecommunications Carriers,”³⁰ which was developed for small wireline firms.³¹ Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees.³² Census data for 2012 indicate that in that year there were 3,117 firms operating businesses as wired telecommunications carriers. Of that 3,117, 3,059 operated with 999 or fewer employees. Based on this data, we estimate that a majority of operators of SMATV/PCO companies were small under the applicable SBA size standard.³³

11. *Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic dish antenna at the subscriber’s location. DBS is now included in SBA’s economic census category “Wired Telecommunications Carriers.” The Wired Telecommunications Carriers industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution; and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities

²⁷ A list of OVS certifications may be found at <http://www.fcc.gov/mb/ovs/csovsccer.html>.

²⁸ See *13th Annual Report*, 24 FCC Rcd at 606-07 para. 135. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

²⁹ See <http://www.fcc.gov/encyclopedia/current-filings-certification-open-video-systems> (current as of July 2012).

³⁰ See 13 CFR § 121.201, NAICS code 517110 (2012).

³¹ Although SMATV systems often use DBS video programming as part of their service package to subscribers, they are not included in Section 340’s definition of “satellite carrier.” See 47 U.S.C. §§ 340(i)(1) and 338(k)(3); 17 U.S.C. § 119(d)(6).

³² 13 CFR § 121.201, NAICS code 517110 (2012).

³³ U.S. Census Bureau, Table EC1251SSSZ5, <https://factfinder.census.gov/faces/nav/jsf/pages/searchresults.xhtml?refresh=t#none>.

and infrastructure that they operate are included in this industry.³⁴ The SBA determines that a wireline business is small if it has fewer than 1,500 employees.³⁵ Economic census data for 2012 indicate that 3,117 wireline companies were operational during that year. Of that number, 3,083 operated with fewer than 1,000 employees.³⁶ Based on that data, we conclude that the majority of wireline firms are small under the applicable standard. Currently, however, only two entities provide DBS service, which requires a great deal of capital for operation: DIRECTV (owned by AT&T) and DISH Network.³⁷ DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Accordingly, we conclude that, in general, DBS service is provided only by large firms.

12. *Television Broadcasting.* This Economic Census category “comprises establishments primarily engaged in broadcasting images together with sound.”³⁸ These establishments operate television broadcast studios and facilities for the programming and transmission of programs to the public.³⁹ These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studio, from an affiliated network, or from external sources. The SBA has created the following small business size standard for such businesses: those having \$41.5 million or less in annual receipts.⁴⁰ The 2012 Economic Census reports that 751 firms in this category operated in that year. Of this number, 656 had annual receipts of less than \$25 million, 25 had annual receipts ranging from \$25 million to \$49,999,999, and 70 had annual receipts of \$50 million or more.⁴¹ Based on this data, we estimate that the majority of commercial television broadcasters are small entities under the applicable SBA size standard.

13. Additionally, the Commission has estimated the number of licensed commercial television stations to be 1374.⁴² Of this total, 1,282 stations (or 94.2%) had revenues of \$41.5 million or less in 2018, according to Commission staff review of the BIA Kelsey Inc. Media Access Pro Television Database (BIA) on April 15, 2019, and therefore these licensees qualify as small entities under the SBA definition. In addition, the Commission estimates the number of licensed noncommercial educational (NCE) television stations to be 388.⁴³ The Commission does not compile and does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

³⁴ See U.S. Census Bureau, *2017 North American Industry Classifications System (NAICS) Definitions*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch> (2012 NAICS Definitions) (NAICS Code 517110).

³⁵ 13 CFR § 121.201 (2012) (NAICS Code 517110).

³⁶ See U.S. Census Bureau, Table No. EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012; 2012 Economic Census of the United States* (Jan. 8, 2016), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table.

³⁷ See *Communications Marketplace Report et al.*, GN Docket No. 18-231 et al., Report, FCC 18-131, 2018 WL 6839365, at *20, paras. 50-51 (Dec. 26, 2018).

³⁸ 2012 NAICS Definitions (NAICS Code 515120).

³⁹ *Id.*

⁴⁰ 13 CFR § 121.201 (2012) (NAICS Code 515120).

⁴¹ U.S. Census Bureau, Table No. EC1251SSSZ4, *Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012* (Jan. 8, 2016), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ4&prodType=table.

⁴² Press Release, FCC, Broadcast Station Totals as of December 31, 2019 (rel. Jan. 3, 2020), <https://www.fcc.gov/document/broadcast-station-totalsdecember-31-2019>.

⁴³ *Id.*

14. We note, however, that in assessing whether a business concern qualifies as “small” under the above definition, business (control) affiliations⁴⁴ must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, another element of the definition of “small business” requires that an entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television broadcast station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive.

15. There are also 387 Class A stations.⁴⁵ Given the nature of these services, the Commission presumes that all of these stations qualify as small entities under the applicable SBA size standard. In addition, there are 1,892 LPTV stations and 3,621 TV translator stations.⁴⁶ Given the nature of these services as secondary and in some cases purely a “fill-in” service, we will presume that all of these entities qualify as small entities under the above SBA small business size standard.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

16. The *Order* does not adopt any reporting or recordkeeping requirements. The *Order* revises the Commission’s rules to permit certain small MVPDs to meet their statutory obligation to negotiate retransmission consent in good faith by designating a qualified MVPD buying group to negotiate on their behalf with a large broadcast station group. In particular, the *Order* revises such rules by clarifying the meaning of the statutory terms “large station group” and “qualified MVPD buying group” so as to facilitate smaller MVPDs’ use of the new collective bargaining provisions consistent with Congressional intent. These rule revisions impose no new regulatory compliance burdens on small television broadcast stations.

F. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

17. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.”⁴⁷

18. In this *Order*, the Commission implements section 1003 of the TVPA in a way that will reduce burdens on smaller MVPDs that negotiate retransmission consent against large broadcast station groups with greater bargaining leverage by allowing such MVPDs to negotiate collectively as a buying group. As noted, the rule revisions adopted in the *Order* will not have an adverse economic impact on any small entities, and would have a positive economic impact on smaller MVPDs that choose to avail themselves of the TVPA’s new collective bargaining provisions in their negotiations with large broadcast station groups that possess market power.

⁴⁴ “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has the power to control both.” 13 CFR § 21.103(a)(1).

⁴⁵ See *supra* note 42.

⁴⁶ *Id.*

⁴⁷ 5 U.S.C. § 603(c)(1)-(c)(4).

G. Report to Congress

19. The Commission will send a copy of the *Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.⁴⁸ In addition, the Commission will send a copy of the *Order*, including this FRFA, to the Chief Counsel for Advocacy of the SBA. The *Order* and FRFA (or summaries thereof) will also be published in the Federal Register.⁴⁹

⁴⁸ See 5 U.S.C. § 801(a)(1)(A).

⁴⁹ See *id.* § 604(b).